IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1307

STATE OF MINNESOTA; COUNTY OF CLEARWATER, a municipal corporation; EUGENE STEVENS and LAURIE STEVENS,

Petitioners,

v.

ZAY ZAH, CHARLES AUBID, GEORGE G. AUBID, SR., A. J. POWERS, LUELLA DAVIS, GORUM RICHARD POWERS, ANNIE DAVIS, MARY SHINGOBE, formerly MARY DAVIS, HENRY DAVIS, JOHN DAVIS, JIM DAVIS, FRANK BENJAMIN, JOE BENJAMIN, MAGGIE BENJAMIN, NE SHO GAH SOW E QUAY, and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the lands described in the Complaint herein,

Respondents.

BRIEF OF GEORGE G. AUBID, SR. IN OPPOSITION TO PETITION FOR CERTIORARI

Of Counsel

ARLINDA F. LOCKLEAR
NATIVE AMERICAN
RIGHTS FUND
1712 N Street, N.W.
Washington, D. C. 20036
Telephone: 202/785-4166

PHILIP N. SCHEIDE
NORTHWEST MINNESOTA
LEGAL SERVICES
507 F-M Center, P.O. Box 714
Moorhead, Minnesota 56560
Telephone: 218/233-8585

JOHN M. HOLMES
763 Seventh Avenue
Fairbanks, Alaska 99701
Telephone: 907/456-5401

Counsel for George G. Aubid, Sr.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1307

STATE OF MINNESOTA; COUNTY OF CLEARWATER, a municipal corporation; EUGENE STEVENS and LAURIE STEVENS,

Petitioners,

v.

ZAY ZAH, CHARLES AUBID, GEORGE G. AUBID, SR., A. J. POWERS, LUELLA DAVIS, GORUM RICHARD POWERS, ANNIE DAVIS, MARY SHINGOBE, formerly MARY DAVIS, HENRY DAVIS, JOHN DAVIS, JIM DAVIS, FRANK BENJAMIN, JOE BENJAMIN, MAGGIE BENJAMIN, NE SHO GAH SOW E QUAY, and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the lands described in the Complaint herein,

Respondents.

BRIEF OF GEORGE G. AUBID, SR. IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

I. Whether a point that has been consistently conceded by Petitioners throughout the proceedings below may serve as the basis for a petition for certiorari.

II. Whether the Trust Status and concomitant tax immunity of the allotment, as defined by the terms of the Trust Patent, were indefinitely extended beyond the original twenty-five year Trust Period by section two of the Indian Reorganization Act of 1934.

STATEMENT

This case concerns the trust status of land allotted to an adult, mixed-blood Chippewa Indian on the White Earth Reservation in the State of Minnesota. Pursuant to Rule 40(3) of the Supreme Court Rules, Respondent makes this abbreviated statement to correct inaccuracies and omissions in Petitioners' Brief:

1. On September 6, 1927, Zay Zah, Respondent's father, received a trust allotment of 80 acres in conformance with the Nelson Act and the General Allotment Act. The Trust Patent, signed by President Coolidge, obligated the United States to hold the land "in trust for the sole use and benefit of said Indian" and to "convey the same by patent to said Indian in fee discharged of said trust and free from all charge and incumbrance whatsoever . . ." at the expiration of the trust period. *See,* Respondent's App. A.

2. The Auditor for Clearwater County, a petitioner herein, executed a tax certificate of forfeiture against this allotment on September 11, 1940, for nonpayment of taxes for the year 1931. Thereafter, the Superintendent of the Consolidated Chippewa Agency applied for cancellation of the tax certificate on the ground that the land was unemcumbered real property held under a Trust Patent and therefore tax exempt; the County Auditor thereupon cancelled the certificate of forfeiture. See Defendant's Second Amended Answer and Counterclaim, ¶ VI.

3. On October 2, 1961, the Clearwater County Auditor executed a second tax certificate of forfeiture against the allotment, for nonpayment of taxes for the year 1964, purporting thereby to vest title in the State of Minnesota. On May 4, 1973, the State of Minnesota purportedly conveyed 40 acres of the allotment to petitioners Eugene and Laurie Stevens as joint tenants.

INTRODUCTION

The Decision of the Minnesota Supreme Court Will Not Have the Broad Impact Claimed by Petitioners.

Far from having the nationwide impact claimed by petitioners, the decision of the Minnesota Supreme Court will at most affect the allotments of a single class of Indian allottees on a single reservation within a single state—mixed-blood Chippewa on the White Earth Reservation within the State of Minnesota. Because of the unique terms of the Clapp Amendment, 34 Stat. 353, as amended by 34 Stat. 1034, and the deliberately narrow holding of the Minnesota Supreme Court, the affect of the decision is limited to a purely local application. The four statutes cited by petitioners as similar to the Clapp Amendment are in fact distinguishable and only highlight the peculiarity of the Clapp Amendment.[1]

---

[1] The Minnesota Supreme Court's construction of the Clapp Amendment is consistent with this Court's construction of the Act of May 27, 1908, 35 Stat. 372, in *Choate* v. *Trapp,* 244 U.S. 665 (1912). Section four of the acts of May 10, 1928, and May 24, 1928 (the latter is an amendment to the former), actually extended the period of tax immunity for certain allotted lands rather than extinguishing the immunity as petitioners suggest. Finally, the Act of August 17, 1949, merely made lands acquired thereafter for a particular tribe taxable for limited municipal purposes.

In explicitly restricting the precedential effect of its decision, the Minnesota Supreme Court stated:

> We reach this result based solely upon the facts of this case. We intimate no opinion as to what might be the result in a different factual setting (Petition, p. 20a)

Relying on an article appearing in the *Mahnomen Pioneer,* petitioners claim that this case will at least have substantial impact upon the White Earth Reservation itself. However, in a letter to respondent's counsel, the Bureau of Indian Affairs summarized the results of a survey conducted to determine the amount of land affected by this decision. The Bureau estimated that less than *one percent* of the land within the White Earth Reservation may be subject to the ruling below. *See,* Respondent's App. B. And, of the *one percent,* only about one-fourth of that land is in the hands of private individuals, the remainder being held by the county or state. Because of this limited effect, even upon the White Earth Reservation itself, the petition for certiorari should be denied.

I.

PETITIONERS CANNOT SEEK CERTIORARI BASED UPON A POINT CONSISTENTLY CONCEDED BY THEM IN THE COURTS BELOW.

Throughout the proceedings below, petitioners have consistently conceded that Zay Zah's allotment was issued subject to a 25-year tax exemption.[2] However,

[2] This concession is not limited to an admission by petitioner's counsel at oral argument. It is consistently found throughout petitioner's pleadings. *See,* for example, Paragraph VI of Plaintiff's

petitioners now deny for the first time that the allotment was issued subject to any tax exemption at all; they do so on the ground that the allotment was issued after, rather than before, the enactment of the Clapp Amendment. Petitioners base their petition for certiorari upon this distinction and charge that the Minnesota Supreme Court ignored this point in its analysis.

However, the Minnesota Supreme Court was keenly aware of both the distinction and the petitioners' concession on the point. In its analysis of *Morrow* v. *United States,* 243 Fed. 854 (8th Cir. 1917), the court stated:

> The only distinguishing factor between the present case and the *Morrow* case is that in *Morrow,* the trust patent was issued prior to the passage of the Clapp Amendment while in the present case the patent was issued approximately twenty years after the Clapp Amendment. This fact fails to distinguish *Morrow* since appellants admit that Zay Zah's property was not taxable from 1927 to 1952, because there was a vested right to tax immunity during this period.
>
> (Petition, p. 12a)

Since this point was not raised or decided below, it is not subject to review on certiorari. This Court has

---

Reply. The concession is also clearly illustrated in the Memorandum of the District Court Judge:

> Except for the fact that the 25-year trust period provided for in Zay Zah's allotment expired in 1952, there would be no issue for me to decide, as *plaintiffs candidly and admirably concede that the Clapp Amendment's direct language is vitiated on constitutional grounds during the 25-year period.* In fact, an earlier tax delinquency proceeding during the 25-year period was cancelled, as set forth in the stipulation of facts agreed to by the parties.
>
> (Petition p. 47a) [emphasis added]

consistently refused to review issues on certiorari that were not presented to or decided by the court below. *Tacon* v. *Arizona,* 410 U.S. 351 (1973); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). The issue now urged by petitioners in this case "is so distinct from the question decided by the state court that [our] decision of the issue raised there would not necessarily decide that now sought to be raised," *Wilson* v. *Cook,* 327 U.S. 474, 483 (1946). It would therefore be inimical to efficient judicial administration to allow petitioners to assert a consistently conceded point as the basis for certiorari.[3]

II.

THE TRUST STATUS AND CONCOMITANT TAX IMMUNITY WERE INDEFINITELY EXTENDED BEYOND THE ORIGINAL TWENTY-FIVE YEAR TRUST PERIOD BY SECTION TWO OF THE INDIAN REORGANIZATION ACT.

Through the Indian Reorganization Act of 1934, 48 Stat. 948 (also known as the Wheeler-Howard Act), Congress acted to strengthen and preserve the existing Indian land base and to arrest the massive depletion of Indian lands that had occurred during the prior

[3] Obviously, respondent does not mean to imply that petitioners would have prevailed in this case but for their admission regarding Zay Zah's right to tax immunity during the trust period. On the contrary, the provisions of the Nelson Act reflect the terms of a binding agreement between the United States and the Chippewa Tribe. *United States* v. *Mille Lac Band,* 229 U.S. 498 (1913). The right of individual tribal members to receive allotments according to the terms of that agreement may have vested as early as the preparation of the original census required by section one of the Nelson Act. *See, Choctaw Nation* v. *United States,* 100 F.Supp. 318 (Ct. Cl. 1951); *Klamath and Modoc Tribes* v. *United States,* 436 F.2d 1008 (Ct. Cl. 1971).

half-century.[4] Furthermore, there is no evidence that Congress intended to exclude this solitary class of Chippewa from the remedial and progressive legislation of the Indian Reorganization Act. The Secretary of the Interior, whose responsibility it is to administer the act, has treated the Indian Reorganization Act as fully applicable to the Minnesota Chippewas. He approved a charter adopted by the tribe under the act and, according to regulations promulgated by the Secretary, section two of the act extends the trust or restricted status of Minnesota Chippewa lands. *See,* 25 C.F.R. 660.

The Minnesota Supreme Court correctly analyzed and resolved the issues in this case in finding that the 25 year tax immunity, admitted by all parties, derived from the trust status of the allotment. This ruling is consistent with the promises originally made in the Trust Patent and with prior case law on the issue. *See, Morrow* v. *United States,* 243 Fed. 854 (8th Cir. 1917); *see also, County of Mahnomen* v. *United States,* 319 U.S. 474 (1943). The court below further noted that "Appellants (petitioners herein) admit that 'read alone, the Wheeler-Howard Act would seem to extend indefinitely the trust period and restrictions placed on any Indian land." Petition, p. 15a. In concluding that the Act did indeed extend the trust status of Zay Zah's allotment, the Minnesota Supreme Court reflected

[4] It is the position of the United States, as amicus curiae in the court below, that the White Earth Reservation comes within the ambit of the Act, (See n.6 of amicus brief. A copy of the United States amicus brief has been lodged with the clerk.) and that, as a result, the trust status of Zay Zah's allotment was indefinitely extended pursuant to section two of the act. *See,* discussion beginning at page 16 of amicus brief.

the manifest intent of Congress to strengthen and preserve the existing Indian land base.[5]

In deciding this case, the Minnesota Supreme Court necessarily construed the Clapp Amendment, a statute ambiguous on its face. The legislative history cited by petitioners hardly resolves the ambiguity. To do so, the statute must be construed in light of applicable canons of construction: in the absence of a clear indication to the contrary, statutes are to be read to reserve Congress' power over Indian lands, *Northern Cheyenne* v. *Hollowbreast,* 425 U.S. 649, 656 (1976); and, any ambiguity is to be resolved in favor of the Indians, *Bryan* v. *Itasca County,* 426 U.S. 373 (1976). When viewed in light of these principles, the judgment

---

[5] In the words of the court,

> We conclude that the trusteeship agreement between Zay Zah and the United States did not terminate in 1952, but was rather extended indefinitely by the Wheeler-Howard Act of 1934. It follows that the tax-exempt status of this land, derived from the trust agreement, did not terminate in 1952, and hence the land did not become subject to forfeiture for nonpayment of taxes.
> (Petition, p. 49a)

of the Minnesota Supreme Court is in accordance with prior law and certiorari should be denied.

Respectfully submitted,

Of Counsel

ARLINDA F. LOCKLEAR
NATIVE AMERICAN
RIGHTS FUND
1712 N Street, N.W.
Washington, D. C. 20036
Telephone: 202/785-4166

PHILIP N. SCHEIDE
NORTHWEST MINNESOTA
LEGAL SERVICES
507 F-M Center, P.O. Box 714
Moorhead, Minnesota 56560
Telephone: 218/233-8585

JOHN M. HOLMES
763 Seventh Avenue
Fairbanks, Alaska 99701
Telephone: 907/456-5401

Counsel for George G. Aubid, Sr.

APPENDIX

APPENDIX

DEED RECORD No. 30—CLEARWATER COUNTY, MINN.

Filed for record August 18th, 1941, at 9 o'clock A.M.,
H. BLAASTUEN
Register of Deeds.

4-1062-R

58388
1266488
31085-27. I. O.
A-3026

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, GREETING:
WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Zay Zah, an Indian of the White Earth Chippewa Reservation, has been allotted the following described lands:

> The Southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section five in township one hundred forty four north of range thirty eight west of the Fifth Principal Meridian, Minnesota, containing eighty acres.

NOW KNOW YE, that the UNITED STATES OF AMERICA, In consideration of the premises, has allotted, and by these presents does allot, unto the said Indian, the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrances whatsoever: but in the event said Indian dies before the expira-

tion of said trust period, of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrances whatsoever: but in the event said Indian dies before the expiration of said trustperiod, the Secretary of the Interior shall ascertain the legal heirs of said Indian, and either issue to them in their names a patent in fee for said land or cause said land to be sold for the benefit of said heirs as provided by law.

In Testimony Whereof, I, Calvin Coolidge, President of the United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, in the District of Columbia, the Sixth day of September, in the year of our Lord one thousand nine hundred and twenty seven and the independence of the United States the one hundred and fifty-second.

By The President, Calvin Coolidge

By Viola B. Pugh, Secretary

M. P. Leroy, Recorder of the General Land Office

18799434

General Land Office Seal

Patent No. 1007109

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MINNESOTA AREA OFFICE
831 SECOND AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55402

IN REPLY REFER TO:
Area Director

April 12, 1978

(Received April 17, 1978)

Mr. John Holmes
c/o Native American Rights Fund
1712 "N" Street, N.W.
Second Floor
Washington, D.C. 20036

Dear Mr. Holmes:

You have asked the Bureau of Indian Affairs for an estimate of the amount of land within the White Earth Indian Reservation which was taxed and forfeited to Clearwater, Becker, and Mahnomen Counties under circumstances similar to those which appear in the facts of *State of Minnesota* v. *Zay Zah*, —— Minn. ——, 259 N.W.2d 580 (1977), *petition for cert. filed* 46 U.S.L.W. 3602 (March 17, 1978) (No. 77-1307). We have, as part of a survey of the records of the Bureau of Indian Affairs and of the relevant counties, attempted to make this determination. Although we are not yet in possession of many relevant documents, and therefore cannot speak with certainty, we believe that less than 1% of the land within the Reservation was so taxed and forfeited, and that ¾ of this 1% was never sold by the counties, but is still purportedly held by the Counties or by the State of Minnesota.

Sincerely yours,

/s/ Casimir L. LeBeau
Casimir L. LeBeau
Acting Area Director